Nos. 01-653 & 01-657

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, AND
VOICESTREAM WIRELESS CORPORATION,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS ARCTIC SLOPE REGIONAL CORPORATION, COUNCIL TREE COMMUNICATIONS, LLC, AND VOICESTREAM WIRELESS CORPORATION

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QUESTION PRESENTED

Whether Section 525 of the Bankruptcy Code, 11 U.S.C. § 525, prohibits the Federal Communications Commission from canceling a radio spectrum license where the agency has determined, in an exercise of its regulatory authority, that such cancellation is necessary to ensure that licenses are granted to those most likely to use them efficiently for the benefit of the public.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in these consolidated cases are the Federal Communications Commission ("FCC"), Arctic Slope Regional Corporation ("Arctic Slope"), Council Tree Communications, LLC ("Council Tree"), and VoiceStream Wireless Corporation ("VoiceStream"). The FCC and the United States were respondents in the proceedings below. Arctic Slope, Council Tree, and VoiceStream were intervenors in the proceedings below.

Arctic Slope is one of twelve regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 *et seq*. Arctic Slope has no parent corporations and no publicly held company owns 10 percent or more of its stock.

Council Tree has no parent corporations and no publicly held company owns 10 percent or more of its stock.

VoiceStream is a Delaware corporation that is wholly owned by Deutsche Telekom AG, a corporation organized under the laws of the Federal Republic of Germany.

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. were petitioners in the proceedings below. The following entities were also intervenors below and are respondents in this Court pursuant to S. Ct. R. 12.6: BellSouth Corporation; BellSouth Cellular Corporation; Cellco Partnership dba Verizon Wireless; AT&T Wireless Services, Inc.; Cellular Telecommunications Industry Association; Dobson Communications Corporation; Sprint Spectrum L.P. dba Sprint PCS; TeleCorp PCS, Inc.; and Nextel Communications, Inc.

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OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 254 F.3d 130 and reproduced at page 1a of the appendix to the petition for certiorari ("Pet. App.") filed by the FCC. The decision of the FCC is reported at 15 F.C.C.R. 693 (2000) and reproduced at

Pet. App. 96a. The FCC's order denying reconsideration of that decision is reported at 15 F.C.C.R. 17500 (2000) and reproduced at Pet. App. 52a.

JURISDICTION

The judgment of the D.C. Circuit was entered on June 22, 2001. Pet. App. 1a. On September 13, 2001, Chief Justice Rehnquist extended the time for petitioners FCC, Arctic Slope, and Council Tree to file a petition for certiorari to and including October 19, 2001. On September 17, 2001, Chief Justice Rehnquist extended the time for petitioner VoiceStream to file a petition for certiorari to and including October 19, 2001. The jurisdiction of the D.C. Circuit was based on 47 U.S.C. § 402(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 309(j) of the Federal Communications Act provides in pertinent part:

> (j) Use of competitive bidding
>
> (1) General authority
>
> If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.
>
> * * *
>
> (3) Design of systems of competitive bidding
>
> For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. * * * In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote * * * the following objectives:
>
> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public * * *;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses * * *;
>
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;
>
> (D) efficient and intensive use of the electromagnetic spectrum * * *. [47 U.S.C. § 309(j).]

Section 525(a) of the Bankruptcy Act provides in pertinent part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor

> under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [11 U.S.C. § 525(a).]

Section 309(j) of the Communications Act and Section 525 of the Bankruptcy Code are reproduced in full at Pet. App. 448a-469a and 427a-428a, respectively. Pertinent provisions of Title 47 of the Code of Federal Regulations are reproduced at Pet. App. 470a-497a.

INTRODUCTION

This case asks whether the FCC is prohibited from carrying out its important statutory mandate under the Communications Act to allocate licenses to the Nation's radio spectrum to those applicants that the FCC has determined are most likely to use the licenses efficiently for the benefit of the public. Congress designated the FCC as the *exclusive* arbiter of the public interest in allocating the Nation's vital and valuable spectrum resources. And as expressly contemplated by Congress, the FCC determined that the public interest in ensuring efficient use of the spectrum and rapid deployment of vital new communications technologies is served by awarding licenses to those entities who value them most, as evidenced in part by timely payment of competitive bids.

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively, "NextWave") are spectrum licensees that defaulted on their payment obligations, thereby showing that they were not fit to hold the licenses under the FCC's regulatory policy. The D.C. Circuit, however, held that Section 525(a) of the Bankruptcy

Code allowed NextWave to frustrate the FCC's central regulatory mission by the simple expedient of declaring bankruptcy. The court permitted NextWave to retain licenses worth more than *$15 billion*, which the FCC determined were not in the public interest for NextWave to hold. In so ruling, the D.C. Circuit overturned the results of a spectrum auction that awarded those licenses to other companies that would serve the public while complying with all regulatory conditions. This ruling has permitted scarce and valuable spectrum to continue to lie fallow as it has for more than five years.

The D.C. Circuit's decision that the Bankruptcy Code overrides the important regulatory objectives of the Communications Act is based on an erroneous construction of the governing law. Section 525 was intended as a narrow proscription on discriminating against debtors; it was not intended to afford debtors special rights to evade valid regulatory requirements and frustrate important regulatory policies. Congress never intended for that bankruptcy provision to force agencies to grant exclusive licenses to entities that, like NextWave, fail to satisfy an express regulatory condition for holding a license. If left to stand, the D.C. Circuit's decision threatens to impair the ability of the FCC, as well as numerous other federal, state, and local government agencies, to carry out critical regulatory missions—to the public's detriment. That decision should be reversed.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

The Communications Act. The electromagnetic (or radio) spectrum is a valuable and scarce public resource. "[T]here are more would-be broadcasters than frequencies available in the electromagnetic spectrum," and "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994).

Thus, Congress long ago determined that "regulation of the radio spectrum by the Federal Government was essential," and that "regulatory power should be utilized to ensure that allocation of this limited resource would be made *only* to those who would serve the public interest." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 375 n.4 (1969) (emphasis added).

In the Communications Act of 1934, Congress "formulated a unified and comprehensive regulatory system for the [communications] industry." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (quotation omitted). Congress centralized authority for allocating and regulating the spectrum in a single agency—the FCC. The Act established the FCC as the "single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication," *id.* (quotations omitted), and vests the agency with the sole authority to license users of the Nation's airwaves upon a determination that the "public interest, convenience, and necessity will be served [there]by." 47 U.S.C. § 309(a). As this Court has held, "Congress assigned to the Federal Communications Commission * * * *exclusive* authority to grant licenses" to use the radio spectrum. *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 553 (1990) (emphasis added), *overruled on other grounds*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995).

Historically, the FCC allocated licenses through comparative hearings and lotteries. Congress eventually concluded, however, that those methods of allocation were "not serv[ing] the public interest." H.R. Rep. No. 103-111, at 248 (1993). Accordingly, in 1993, Congress authorized the FCC to award radio licenses "through [a] system of competitive bidding." Pub. L. No. 103-66, § 6002, 107 Stat. 312, 388. And in 1997, Congress *required* competitive bidding in most instances. *See* Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258 (1997); 47 U.S.C. § 309(j)(1). Congress acted on the belief that "[b]ecause new licenses would be paid for, a competitive bidding system will ensure that spectrum is used

more productively and efficiently than if handed out for free." H.R. Rep. No. 103-111, at 249. Thus, Congress replaced the previous schemes for determining the public interest—which focused on individualized examinations of prospective licensees—with a scheme under which fitness is determined in large part by a licensee's willingness and ability to devote resources to serve the public in a timely manner.

In amending the Act to authorize competitive bidding, Congress directed the FCC to develop a methodology that would "include safeguards to protect the public interest in the use of the spectrum" and that would promote a number of objectives, including "the development and rapid deployment of new technologies, products, and services," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). Congress further directed the FCC to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people" by "disseminating licenses among a wide variety of applicants, including small businesses." *Id.* § 309(j)(3)(B). To accomplish this goal, Congress instructed the FCC to "consider alternative payment schedules and methods of calculation, including * * * guaranteed installment payments." *Id.* § 309(j)(4)(A).

In 1994, the FCC adopted rules to auction licenses for broadband personal communications services ("PCS")—a new generation of mobile communications services, featuring new devices such as small, lightweight, multi-function portable telephones. *In re Implementation of Section 309(j) of the Communications Act, Fifth Report & Order* ("*Section 309(j) Implementation Order*"), 9 F.C.C.R. 5532 ¶ 3 (1994). The FCC explained that auctions were superior to other licensing methods. It found that competitive bidding would better "speed the development and deployment of new services to the public and would encourage efficient use of the spectrum," because "*auctions would generally award licenses quickly to those parties who value them most highly*

and who are therefore most likely to introduce service rapidly to the public." *Id.* ¶ 5 (emphasis added). Thus, as Congress envisioned, the FCC made a policy judgment that market forces—as represented by an applicant's willingness and ability to pay for a license—would largely determine which applicants would best serve the public interest.

Seeking to fulfill its statutory mandate to promote small business participation, the FCC set aside two blocks of PCS licenses—the "C" and "F" Blocks—for bidding by entities with annual gross revenues and total assets below specified amounts. *Id.* ¶ 12. The FCC also decided to allow successful bidders within those blocks to pay for their licenses in installments. *Id.* ¶ 16.

To ensure that licenses remained in the hands of those who would further the important regulatory objectives set out in the Communications Act, the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining a license. 47 C.F.R. § 24.708(a) (1997). Likewise, for bidders paying for licenses under installment plans, the FCC specifically made "full and timely performance of the licensee's payment obligations under the installment plan" a regulatory condition for keeping a license. 47 C.F.R. § 1.2110(e)(4) (1997). The FCC's rules warned that, if a licensee failed to make a timely payment, "the license [would] automatically cancel." *Id.* § 1.2110(e)(4)(iii). This requirement was in accord with the FCC's policy determination that the public interest in the rapid introduction of new technologies and service is best served when spectrum is allocated to licensees who place the highest value on the licenses as evidenced by their ability to pay in a timely manner.

The Bankruptcy Code. In 1978, Congress enacted a comprehensive overhaul of the Nation's bankruptcy system. The central purpose of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598—which established today's Bankruptcy Code—was the "modernization" of the bankruptcy laws.

H.R. Rep No. 95-595, at 3 (1977). Designed during the "horse and buggy era," the substantive law of bankruptcy and the then-current bankruptcy system had last been revised in 1938. *Id.* Since then, the consumer credit industry had grown exponentially. One of the goals of the Reform Act was to "make[] bankruptcy a more effective remedy for the unfortunate consumer debtor." *Id.* at 4.

To that end, the Reform Act established a number of consumer debtor protections. Among them is Section 525, which is entitled "Protection against discriminatory treatment" and provides in pertinent part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license permit, charter, franchise, or other similar grant to * * * a person that is or has been a debtor under this title * * * solely because such * * * debtor is or has been a debtor under this title[,] * * * has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title * * *. [11 U.S.C. § 525(a).]

The legislative history makes clear that Section 525(a) was intended to "codif[y]" the result of this Court's decision in *Perez* v. *Campbell*, 402 U.S. 637 (1971). H.R. Rep. No. 95-595, at 165. *Perez* involved an Arizona statute that provided that the failure to satisfy a tort judgment arising out of an automobile accident resulted in the automatic suspension of a drivers' license even where the judgment had been discharged in bankruptcy. This Court invalidated the statute as conflicting with the former Bankruptcy Act's policy of ensuring debtors a "new start." 402 U.S. at 649.

As the House Report notes, "[s]imilar discrimination" to that at issue in *Perez* had also occurred in other areas. H.R. Rep. No. 95-595, at 165. "Municipalities have occasionally dismissed employees such as firemen or policemen because

of a bankruptcy," and "[n]onpayment of a debt to a credit union has occasionally resulted in loss of a job." *Id.* Moreover, "[d]iscrimination based solely on nonpayment could encourage reaffirmations [of debt], contrary to the [Code's] expressed policy." *Id.* at 367. The report thus emphasizes that Section 525(a) was intended to protect debtors from *discrimination*: "The purpose of the section is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws. * * * To penalize a debtor by discriminatory treatment as a result [of a bankruptcy] is unfair * * *." *Id.* at 165.

Accordingly, the report makes clear that:

> [t]he prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability. * * * *[I]n those cases where the causes of a bankruptcy are intimately connected with the license,* * * * *an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy.* [H.R. Rep. No. 95-595, at 165 (emphasis added).]

B. Factual Background.

NextWave's Bankruptcy. NextWave was formed in 1995 for the purpose of bidding on PCS licenses. At the FCC's C Block auctions in 1996, NextWave successfully bid on 63 licenses, bidding $4.74 billion in total. Pet. App. 5a. NextWave also successfully bid on 27 F Block licenses after submitting bids totaling approximately $123 million. Public Notice, *D, E, and F Block Auction Closes*, No. DA 97-81, 1997 WL 20711 (Jan. 15, 1997).

Under FCC rules, and as contemplated by Congress, *see* 47 U.S.C. § 309(j)(4)(A), NextWave was permitted to pay for its licenses in installments. NextWave made a down payment, and the FCC granted NextWave its licenses. The licenses, however, expressly stated that they were "conditioned upon the full and timely payment of all monies due," and that failure to comply with that obligation "[would] result in the automatic cancellation" of the licenses. Pet. App. 388a.

After the FCC awarded the C Block licenses, NextWave and other C Block bidders encountered financial difficulties. In response, the FCC temporarily suspended installment payment obligations for C Block licensees, and issued a series of orders offering financially troubled licensees several payment restructuring options that allowed them to surrender some or all of their licenses for full or partial forgiveness of their outstanding debt.[1] The FCC refused, however, to allow any bidders to retain their licenses for less than they had bid, reasoning that such a result "would be very unfair to other bidders," and would "gravely undermine the credibility and integrity" of the auction process. 12 F.C.C.R. 16436 ¶ 19. The FCC gave licensees until June 8, 1998 to elect an option, and until October 29, 1998 to resume installment payments.

Although many C Block licensees chose to avail themselves of a restructuring option and surrender licenses for

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[1] *See In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report & Order & Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 16436 (1997); *In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of Second Report & Order*, 13 F.C.C.R. 8345 (1998); *In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Order on Reconsideration of Second Report & Order*, 14 F.C.C.R. 6571 (1999).

which they could not pay, NextWave did not. Instead, on June 8, 1998, after failing to obtain stays of the election deadline from the FCC and the D.C. Circuit, NextWave filed a Chapter 11 petition for bankruptcy in New York. After declaring bankruptcy, NextWave made no installment payments on its licenses, nor did it ever seek permission to do so. Rather, NextWave sought to avoid its $4.74 billion license obligation as a "fraudulent conveyance" while at the same time retain its licenses. NextWave alleged that by the time it received its licenses they were worth far less than what it had bid for them.[2]

Ruling in NextWave's favor, the Bankruptcy Court found that NextWave's winning bid exceeded the fair market value of the licenses at the time they were granted, and that a fraudulent conveyance had thus occurred. Pet. App. 357a-358a (*NextWave Personal Communications, Inc.* v. *FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999)). Consequently, the court avoided $3.72 billion of NextWave's $4.74 billion obligation to the FCC, ruling in effect that NextWave could keep its licenses for the reduced price of $1.02 billion. *Id.* The District Court upheld the Bankruptcy Court's decision.

The Second Circuit reversed. *Id.* at 213a (*FCC* v. *NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 531 U.S. 43 (2000)). The court observed that the Bankruptcy Court had treated the matter as "a simple bankruptcy case," and the issues before it as concerning "solely the debtor-creditor relationship between the FCC and [NextWave]." *Id.* at 234a (quotations omitted). That approach, the Second Circuit held, was "fundamentally mis-

[2] Section 554(b) of the Code allows the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b).

taken." *Id.* at 235a. As the court explained, the FCC's "full and timely payment" requirement was "a *regulatory* condition for obtaining and retaining a spectrum license," and had "a *regulatory* purpose related directly to the FCC's implementation of the spectrum auctions"—"to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." *Id.* at 229a-230a, 235a (emphasis added).

The FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Id.* at 234a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications":

> [i]t indicated that under the predictive mechanism created by Congress to guide the FCC, *NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted.* It meant, in *regulatory* terms, that NextWave was not entitled to the Licenses." [*Id.* (emphasis added).]

As the court held, "[b]y holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the Bankruptcy Court had impermissibly "impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them." *Id.* at 235a.

Upon remand, NextWave prepared a new plan of reorganization that provided for a single lump sum payment to satisfy its $4.3 billion outstanding obligation to the FCC. The FCC objected to the plan on the basis that—as expressly provided in the agency's regulations and the licenses themselves—NextWave's C and F Block licenses had automatically canceled when NextWave defaulted on its first installment payment. On January 12, 2000, the FCC issued a Public Notice announcing that NextWave's licenses—as well as licenses previously held by others—would be re-auctioned in

light of the prior automatic cancellations. *Id.* at 96a (Public Notice, *Auction of C and F Block Broadband PCS Licenses*, 15 F.C.C.R. 693 (2000)).

NextWave again sought relief from the Bankruptcy Court, which declared the FCC's cancellation of NextWave's licenses "null and void." *Id.* at 135a (*In re NextWave Personal Communications Inc.*, 244 B.R. 253 (Bankr. S.D.N.Y. 2000)). Among other things, the court concluded that the cancellation violated the Bankruptcy Code's automatic stay (11 U.S.C. § 362) and cure (11 U.S.C. §§ 1123, 1124) provisions. *Id.* at 155a-163a. The court also indicated that the cancellation may have violated Section 525. *Id.* at 163a-168a. The court acknowledged that the Second Circuit had held "that there is a 'regulatory' aspect in the FCC's 'payment in full' requirement," *id.* at 191a, but concluded that there is "no such aspect * * * with respect to the FCC's 'timely payment' requirement," which it considered a matter of "pure debtor-creditor economics." *Id.*

The Second Circuit granted mandamus, holding that the Bankruptcy Court had once again impermissibly "interfer[ed] with the licensing decisions of the FCC." *Id.* at 128a (*In re FCC*, 217 F.3d 125 (2d Cir.), *cert. denied*, 531 U.S. 1029 (2000)). The Bankruptcy Court, the Second Circuit observed, had concluded that the FCC's cancellation of the licenses "lack[ed] any comprehensible regulatory objective," and was "therefore simply the action of an ordinary creditor." *Id.* at 118a (quotation omitted). As the Second Circuit explained, however, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 119a. Thus, because "[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness," the FCC's decision to re-auction NextWave's licenses "implicate[d] the conditions of

licensure, in itself a circumstance sufficient to require the bankruptcy court's deference." *Id.*

In the meantime, NextWave filed a petition asking the FCC to reconsider the cancellation of its licenses, arguing, among other things, that the cancellation violated various provisions of the Bankruptcy Code. The FCC denied the petition, finding that the cancellation was "fully consistent" with Section 309 and its implementing regulations. *Id.* at 66a (*In re Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses*, 15 F.C.C.R. 17500 ¶ 11 (2000)). As the Commission explained:

> NextWave is providing no service. The spectrum licensed to NextWave has gone unused since early 1997 and represents licenses in 90 markets across the United States. * * * *NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services in many areas of the United States, to the detriment of the American public.* [*Id.* at 82a (emphasis added).]

The Re-Auction. NextWave appealed the FCC's decision to the D.C. Circuit. While its appeal was pending, the FCC held a new auction of NextWave's licenses (as well as licenses previously held by others), in order to award them to entities that, unlike NextWave, would satisfy the FCC's regulatory requirements. The auction was completed on January 26, 2001. Petitioner Arctic Slope has a substantial interest in Alaska Native Wireless, LLC ("ANW"), which in the re-auction successfully bid over $2.7 billion for licenses previously held by NextWave, subject to certain regulatory approvals.[3] Petitioner VoiceStream successfully bid over

[3] ANW is not a formal party to this case because ANW had not yet been formed when intervention motions were required to be filed in the D.C. Circuit. Counsel for petitioners is also counsel for ANW, and this brief represents the views of ANW as well.

$364 million for licenses previously held by NextWave. In addition, VoiceStream has a substantial, non-controlling interest in Cook Inlet/VS GSM V PCS, LLC, which successfully bid over $474 million for licenses previously held by NextWave. Petitioner Council Tree participated in the proceedings leading up to the re-auction, and is a prospective participant in future FCC auctions. Overall, successful bids for NextWave's licenses totaled more than $15.8 billion, more than three times what NextWave had bid for them in 1996. On November 13, 2000, the D.C. Circuit granted petitioners leave to intervene in the proceedings below.

The Decision Below. On June 22, 2001, the D.C. Circuit invalidated the FCC's cancellation of NextWave's licenses. *Id.* at 2a. As a threshold matter, the court determined that it was not bound by the Second Circuit's mandamus decision under principles of res judicata. According to the D.C. Circuit, the Second Circuit's decision was exclusively jurisdictional in nature—"a decision about *where* NextWave's bankruptcy challenges should be decided, not *how* they should be resolved." *Id.* at 22a-23a (quotation omitted; emphasis in original). Thus, in the D.C. Circuit's view, the Second Circuit had rejected NextWave's Bankruptcy Code arguments on the bizarre ground that the Bankruptcy Court lacked jurisdiction to apply the Bankruptcy Code. *Id.* at 24a (construing Second Circuit as holding that "the bankruptcy court lacked jurisdiction to apply the Code to [the FCC's] acts"). The D.C. Circuit thus held that it could consider anew NextWave's argument that the cancellation of its licenses contravened Section 525 of the Bankruptcy Code—an argument that NextWave had raised in the Second Circuit but upon which it had not prevailed.

Turning to the merits, the court held that the cancellation of NextWave's licenses violated Section 525 because—in its view—the FCC had cancelled NextWave's licenses "solely because" NextWave had not paid a debt dischargeable in its bankruptcy case. In doing so, the court rejected the argument

that the licenses had not been cancelled "solely" because NextWave had failed to pay a dischargeable debt, but rather because the FCC had determined that NextWave was not "the applicant most likely to use the [l]icenses efficiently for the benefit of the public." *Id.* at 45a (quotation omitted). The court acknowledged that "[i]t may be true, as the Second Circuit decided, that the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis." *Id.* Nevertheless, the court held that because NextWave's failure to make its payments was "the 'sole' trigger of the license cancellation," *id.*, Section 525 applied even though the Commission had "acted for a regulatory purpose." *Id.* at 51a.

The court also rejected the argument that so long as NextWave retained its licenses its payment obligations were express regulatory conditions and were thus not "dischargeable" within the meaning of Section 525. *Id.* at 42a. In the D.C. Circuit's view, although the Second Circuit had held that the Bankruptcy Court "had no authority to modify" the license condition, "[i]t never decided that a court of competent jurisdiction (such as this one) could not modify or discharge it under section 525." *Id.* The court also held that the FCC was improperly requesting "a regulatory purpose exception to section 525." *Id.* at 42a-43a.

The D.C. Circuit "ha[d] no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions." *Id.* at 48a. The court was also "mindful that * * * allowing NextWave to retain its licenses may be grossly unfair to losing bidders and licensees who complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties." *Id.* (quotation omitted). But "[a]ny unfairness," the court reasoned, "was inherent in the Commission's decision to employ a licensing scheme that left its regulatory actions open to attack under

* * * the Bankruptcy Code." *Id.* at 48a-49a. As the court saw it, "nothing in the [Communications] Act required [the FCC] to enter a creditor relationship with winning bidders." *Id.* at 50a. "Having chosen * * * a scheme that put it in a creditor-debtor * * * relationship with its licensees," *id.*, the court concluded, "section 525 prevents the Commission, *whatever its motive*, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." *Id.* at 49a (emphasis added).

The D.C. Circuit subsequently denied the FCC's request to stay the mandate pending the filing of a petition for certiorari. The FCC thereupon reinstated NextWave's licenses, subject to the caveat that ongoing litigation "may affect the status of the involved licenses." Public Notice, *Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation*, 16 F.C.C.R. 15970 (2001).

Winning bidders in the re-auction have sought to employ the former NextWave licenses to serve the public while complying with all license conditions. The D.C. Circuit's decision, however, has frustrated that effort. Meanwhile, NextWave has yet to serve a single customer with the spectrum that is the subject of this case, which it was awarded more than five years ago.

SUMMARY OF ARGUMENT

Section 525 is a narrow anti-discrimination provision that prevents government agencies from denying, revoking, suspending, or refusing to renew licenses or similar grants "solely because" a person is or was a debtor or has not paid a debt "dischargeable" in bankruptcy. Congress's goal was to further the Bankruptcy Code's policy of giving debtors a "fresh start," by precluding agencies from taking certain actions against debtors *solely* because of their bankruptcy. NextWave seeks to use this modest shield as a sword to

ensure its stranglehold on the public airwaves notwithstanding its failure to comply with a key regulatory condition of its licenses. In sanctioning that result, the D.C. Circuit erred in its interpretation of the law.

NextWave's licenses were not cancelled "solely because" NextWave failed to pay a debt. Section 525 prevents a government agency from canceling a license for one of the reasons enumerated in the statute, *and no other*. Here, it is undisputed that the FCC had a valid regulatory motive for automatically canceling NextWave's licenses—its express, unchallenged determination that NextWave's further control of those licenses disserves the public interest. The FCC's auction rules—including its "full and timely payment" requirement—"have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." Pet. App. 235a. The D.C. Circuit thus erred in preventing the FCC from fulfilling its exclusive statutory responsibility to determine whether a licensee's use of the public airwaves serves the public interest. Because Section 525 does not prohibit a government agency from canceling a license even in part for *any* reason other than those enumerated in the statute, the FCC did not run afoul of Section 525 in canceling NextWave's licenses in furtherance of its regulatory policy.

Moreover, NextWave's licenses were not cancelled solely because NextWave failed to pay a "debt that is dischargeable" in bankruptcy. The Bankruptcy Court had no jurisdiction or authority to modify the FCC's timely-payment condition—the reason for the cancellation—while NextWave held its licenses, and the payment condition was thus not "dischargeable" within the meaning of Section 525. And in any event, to the extent NextWave's licenses can be viewed as contracts rather than regulatory obligations, the parties' duties are executory, and even NextWave admits that the cancellation of an executory contract for failure to adhere to its terms does not violate Section 525.

The D.C. Circuit's decision is also inconsistent with the structure and legislative history of the Bankruptcy Code. The D.C. Circuit's interpretation of Section 525 cannot be reconciled with Section 362(b)(4), which exempts regulatory action from the broad scope of the Code's "automatic stay." Congress plainly did not intend to exempt the FCC's regulatory actions from the stay, while at the same time absolutely prohibit them under Section 525. The legislative history of the Code confirms this understanding. Congress intended to prevent "discrimination" against debtors by codifying this Court's decision in *Perez* v. *Campbell*, 402 U.S. 637 (1971), which invalidated a state law that served as a weapon to coerce debtors into paying discharged debts owed to third parties. In this case, the FCC was not enforcing NextWave's payment obligations to coerce NextWave into paying a debt, but rather to enforce a regulatory condition designed to ensure that licenses go to those most likely to further the public interest in the rapid deployment of new technologies and the efficient use of the spectrum. Moreover, an even-handed policy of canceling licenses for failure to meet express regulatory conditions—including timely payment for the licenses themselves—in no way discriminates against debtors.

Finally, the decision below needlessly creates a conflict between the Bankruptcy Code and the Communications Act. Congress long ago vested in the FCC the *exclusive* authority to grant licenses to the Nation's spectrum. In authorizing the FCC to award licenses through competitive bidding, Congress not only continued the FCC's role as the exclusive arbiter of the public interest, but also established a strong national policy favoring auctions as a principal means of determining that public interest. The D.C. Circuit held that the Bankruptcy Code forces the FCC to leave licenses in the hands of an entity the agency has determined is not serving the public interest. That decision strips the FCC of its regulatory authority, undermines the integrity of the auction

process, and impedes the important regulatory goals identified by Congress in the Communications Act.

The implications of the D.C. Circuit's decision extend far beyond this case. Hundreds of federal, state, and local government agencies award licenses, franchises, and similar grants conditioned in part on payment obligations designed to ensure that the public interest is served. Under the D.C. Circuit's decision, however, those agencies cannot cancel a license or similar grant where a debtor defaults on a payment obligation, even if an agency reasonably determines in an exercise of its regulatory authority that the debtor's default demonstrates that its continued hold on a license disserves the public interest. Congress did not intend for Section 525 to frustrate important regulatory policies in this manner.

ARGUMENT

I. THE CANCELLATION OF NEXTWAVE'S LICENSES DID NOT VIOLATE SECTION 525.

A. NextWave's Licenses Were Cancelled Because of Valid Regulatory Reasons, Not "Solely" Because of Its Failure to Pay a Debt.

The starting point in determining the scope of Section 525 is the statute itself. *See, e.g., Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484 (1996); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 520 (1982). Section 525(a) provides that, with certain exceptions not at issue here:

> [A] government unit may not deny, revoke, suspend, or refuse to renew a license * * * to * * * a person that is or has been a debtor under this title * * * *solely because* such * * * debtor * * * is or has been a debtor under this title[,] has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title. [11 U.S.C. § 525(a) (emphasis added).]

The D.C. Circuit concluded that the FCC violated Section 525 because—in its view—the agency cancelled NextWave's licenses "solely because" NextWave failed to pay a debt dischargeable in its bankruptcy case. That was error.

This Court gives the words of a statute their "ordinary, contemporary, common meaning." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000) (quotation omitted). "Solely" means "alone," "singly," "exclusively." *See, e.g., Webster's II New College Dictionary* 1050 (1995). Thus, a government agency does not contravene Section 525 unless it cancels a debtor's license for one of the reasons prohibited by the statute, *and no other*. In this case, the FCC had an *unchallenged* reason for canceling NextWave's licenses that is not among those enumerated in the statute—its regulatory determination that allowing NextWave to retain its licenses would not serve the public interest as contemplated by Congress. Because it is undisputed that this critical regulatory purpose was a central reason for the automatic cancellation of NextWave's licenses, that cancellation did not occur "solely" because of NextWave's bankrupt status or failure to pay a dischargeable debt, and Section 525 accordingly was not violated.

Recognizing that "a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free," H.R. Rep. No. 103-111, at 249, Congress directed the FCC to award radio licenses by auction in a manner that promotes important governmental objectives, including the "development and rapid deployment of new technologies, products, and services for the benefit of the public," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). In adopting rules for awarding the PCS licenses at issue in this case, the FCC specifically determined that "the use of competitive bidding to award broadband PCS licenses, as compared to other licensing methods, would speed the development and deployment of new services to the public and would encourage efficient use of the spectrum," because

"auctions would generally award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public." *Section 309(j) Implementation Order*, 9 F.C.C.R. 5532 ¶ 5.

As the Second Circuit explained in rejecting NextWave's attempts to invoke the Bankruptcy Code as a basis for keeping its licenses, the auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the high bid entails the obligation to make good the amount bid." Pet. App. 246a. Accordingly, the FCC made "full and timely payment of the winning bid" a condition for holding a license. *See* 47 C.F.R. § 24.708(a) (1997); 47 C.F.R. § 1.2110(e)(4) (1997). As the Second Circuit explained, the FCC's auction rules—including its "full and timely payment" requirement—"have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." Pet. App. 235a. The FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the [l]icenses to NextWave." *Id.* at 234a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Id.* "It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave *was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted*." *Id.* (emphasis added).

Accordingly, the FCC's cancellation of NextWave's licenses did not occur "solely because" NextWave failed to pay a "debt." Rather, the licenses cancelled because NextWave failed to satisfy an express *regulatory* condition on NextWave's right to hold its licenses. NextWave has not—and could not—challenge the validity of the regulatory policies underlying the FCC's timely-payment condition. Nor could it credibly dispute that allowing a licensee to retain its hold on the public airwaves notwithstanding a failure to

satisfy license payment conditions quite clearly frustrates the FCC's regulatory purposes. As the FCC found, "NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services in many areas of the United States, to the detriment of the American public." Pet. App. 82a.

In sum, NextWave's licenses were cancelled because NextWave's retention of them was not in the public interest as determined by the FCC. The cancellation was therefore not "solely" because NextWave failed to pay a debt, and any other interpretation of Section 525 would destroy the integrity of the Communications Act's licensing scheme. Having designated the FCC as the exclusive arbiter of the public interest in the allocation of the radio spectrum, it is inconceivable that Congress intended for licensees, aided by bankruptcy judges, to countermand the FCC's determination of the public interest simply by declaring bankruptcy. In fact, Congress determined the opposite. In authorizing competitive bidding, Congress declared that "[n]othing * * * in the use of competitive bidding, shall diminish the authority of the [FCC] * * * to regulate or *reclaim* spectrum licenses." 47 U.S.C. § 309(j)(6)(C) (emphasis added). Yet under the D.C. Circuit's interpretation, NextWave need never pay for its valuable licenses and the FCC will *never* be able to reclaim them where the cancellation is related even in part to that non-payment. That is not what Congress intended.

NextWave has never seriously disputed that the FCC had a valid regulatory motive for canceling its licenses. Nor did the D.C. Circuit. *See* Pet. App. 45a ("It may be true, as the Second Circuit decided, that the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis."). Nevertheless, the court held that *regardless* of whether the FCC "acted for a regulatory purpose," *id.* at 51a, the agency ran afoul of Section 525 because NextWave's failure to make its payments was "the 'sole' trigger of the license cancellation." *Id.* at 45a. In other words, the court concluded that because NextWave's licenses would not have cancelled "but for" NextWave's failure to make a timely installment payment, the FCC violated Section 525—even if the agency had other legitimate reasons for canceling the licenses.

That holding ignores the plain language of the statute. This Court has stated " 'time and again' " that Congress " 'says in a statute what it means and means in a statute what it says.' " *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941, 956 (2002) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)). Thus, when Congress said "solely," it meant what it said. Section 525 does not prohibit a government agency from canceling a license even in part for *any* reason other than those enumerated in the statute, because in that case the cancellation does not occur "solely because" of one of the statute's prohibited reasons. So long as a government unit acts at least in part for a valid reason not enumerated in the statute, Section 525 is not violated merely because the cancellation would not have occurred "but for" one of the prohibited reasons. " 'But for' causation is * * * poles apart from 'sole cause,' as innumerable cases * * * make clear." *United States* v. *Dyer*, 216 F.3d 568, 570 (7th Cir. 2000) (Posner, J.) (citing cases). Indeed, in the civil rights context, this Court has clearly distinguished the concept of "but for" causation from "sole" causation, noting that the words " 'because of' do not mean '*solely* because of.' " *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) (emphasis in original) (superseded by statute on other grounds). The D.C. Circuit's contrary reading of Section 525 impermissibly renders the word "solely" superfluous. *See TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 449 (2001) (statute must be con-

strued so that "no clause, sentence, or word [is] superfluous, void, or insignificant") (quotation omitted).[4]

In brushing aside the FCC's undisputed regulatory motive, the D.C. Circuit also concluded that "the statute says nothing about an agency's motives in canceling a license for failure to pay a dischargeable debt." Pet. App. 45a. The court further reasoned that an "intent-based reading of section 525 would allow governmental units to escape section 525's limitations simply by invoking a regulatory motive for their concern with timely payment." *Id.* But Section 525, like other anti-discrimination laws, *is* inherently "intent-based." It prohibits a government entity from canceling a license solely *because*—*i.e.*, solely "[f]or the reason that"[5]—a debtor "is or has been a debtor," "has been insolvent," or "has failed to pay a debt that is dischargeable" in its bankruptcy case.

Moreover, there is no basis for the D.C. Circuit's concern that agencies will be able to "escape" Section 525's prohibitions if the statute is interpreted to mean what it says. The mere fact that an agency will often have a valid regulatory reason for canceling a license is no justification for disregarding the statute's plain terms. *See, e.g.*, *Laracuente*, 891

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[4] Not surprisingly, other circuit courts have soundly rejected a "but for" approach when interpreting the words "solely because" in Section 525. *See Comeaux* v. *Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1268-69 (9th Cir. 1990); *Laracuente* v. *Chase Manhattan Bank*, 891 F.2d 17, 21-23 (1st Cir. 1989); *Exquisito Servs., Inc.* v. *United States (In re Exquisito Servs., Inc.)*, 823 F.2d 151, 152-154 (5th Cir. 1987) (all applying identical relevant language of Section 525(a) and (b)). As the Fifth Circuit has held, the "better approach" is to read the statute "narrowly" in accord with its plain language and "require[] proof that [the challenged action] was caused *solely*" for one of the statute's proscribed reasons, and no other. *Exquisito*, 823 F.2d at 153 (emphasis added).

[5] *Webster's II New College Dictionary* 98. "Reason," in turn, means "basis or motive for an action [or] decision." *Id.* at 923.

F.2d at 22-23 & n.2 (unlikelihood that government agency could be found to have acted solely on enumerated grounds is not grounds for construing Section 525 other than as written). Simply issuing a regulation requiring timely payment does not necessarily make timely payment a valid regulatory condition for holding a license rather than a purely financial one. For example, the cancellation of a business or professional license for non-payment of an unrelated debt that was discharged in bankruptcy will not necessarily serve a legitimate regulatory purpose. Here, by contrast, it is *undisputed* that the FCC's "full and timely payment" requirement served valid "regulatory" purposes, including "the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum." Pet. App. 119a.

And even where, unlike here, the existence of a valid regulatory purpose is disputed, courts are quite capable of discerning between valid regulatory goals and the kinds of purely financial motives the Bankruptcy Code addresses. For instance, in applying the "regulatory power" exception to the Bankruptcy Code's "automatic stay" provisions, *see* 11 U.S.C. § 362(b)(4); *infra* at 33-34, courts routinely must "distinguish[] between situations in which the [government] acts pursuant to its 'police and regulatory power' and situations in which the [government] acts merely to protect its status as a creditor." *Safety-Kleen, Inc.* v. *Wyche*, 274 F.3d 846, 865 (4th Cir. 2001). Laws often have the "dual purpose" of "promoting the public welfare as well as protecting the [government's] pecuniary interest." *Id.* In these circumstances, "[o]nly if the action is pursued *solely* to advance a pecuniary interest of the governmental unit will the automatic stay bar it." *Universal Life Church, Inc.* v. *United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1299 (9th Cir. 1997) (emphasis added; quotation omitted), *cert. denied*, 524 U.S. 952 (1998). *See also Safety-Kleen*, 274 F.3d at 865 (citing cases applying "primary purpose" test). Likewise, courts are plainly capable of applying the plain language of

Section 525 to determine whether an action with respect to a license or similar grant has been taken "solely because" of one of the listed reasons or whether, as here, the action is based at least in part on a valid regulatory purpose.[6]

In authorizing the FCC to use competitive bidding, Congress directed the FCC not to use revenue-collection concerns as the *sole* reason for license determinations. *See* 47 U.S.C. § 309(j)(7)(B) (FCC may not "bas[e] a finding of public interest, convenience, and necessity *solely* or predominantly on the expectation of Federal revenues") (emphasis added). *See also* H.R. Rep. No. 103-111, at 258 (the FCC "is not a collection agency of the U.S. Government"). NextWave has never alleged—nor could it—that the FCC failed to comply with the Communications Act when it determined that its "full and timely payment" requirement serves important regulatory purposes rather than just financial interests. Implementation of that requirement is likewise entirely consistent with Section 525.

B. NextWave's Licenses Were Not Cancelled Solely Because NextWave Failed to Pay a Debt That Is Dischargeable In Its Bankruptcy Case.

The D.C. Circuit's decision cannot be squared with the terms of Section 525 for another, related reason. Section 525 prohibits a government agency from canceling a license "solely because" a debtor "has not paid a debt that *is dischargeable in the case under this title*." 11 U.S.C. § 525(a) (emphasis added). As noted, NextWave's timely-payment

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6 *See, e.g., Housing Auth.* v. *James (In re James)*, 198 B.R. 885, 888 (Bankr. W.D. Pa. 1996) ("Section 525(a) is not violated, even if one of the grounds enumerated therein is present, so long as the governmental unit also has a *bona fide* reason other than those enumerated therein for taking action against [the] debtor."); *accord Housing Auth.* v. *Collins (In re Collins)*, 199 B.R. 561, 566 (Bankr. W.D. Pa. 1996).

obligations—the reason for the automatic cancellation—were express regulatory conditions on its right to hold its licenses. *See* Pet. App. 388a; 47 C.F.R. § 1.2110(e)(4) (1997). As such, the licenses were not cancelled for failure to pay "a debt that is dischargeable" in NextWave's bankruptcy case, because the Bankruptcy Court had no power to modify the FCC's regulatory conditions required while NextWave held its licenses. The D.C. Circuit's contrary conclusion is an additional ground for reversal.

"[T]he restructuring of debtor-creditor relations * * * is at the core of the federal bankruptcy power." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). *See also Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 466 (1982) ("bankruptcy" is defined as " the 'subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief' ") (quoting *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 513-514 (1938)). As the Second Circuit explained in rebuffing the Bankruptcy Court's attempts to modify NextWave's payment obligations, "[i]n granting licenses by auction, the FCC acts as creditor and regulator both." Pet. App. 244a. The Bankruptcy Code—with its purpose of "restructuring * * * debtor-creditor relations"—applies to the FCC's actions, however, only insofar as the FCC "act[s] solely as a creditor." *Id.* at 245a. It does not purport to limit the FCC's exercise of its regulatory authority. *Id.* at 244a.

As noted above, the FCC's timely-payment requirement serves indisputably valid regulatory goals. Congress has further provided that "no [spectrum] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. The Bankruptcy Court thus had no authority to relieve NextWave of its *regulatory* payment condition so long as NextWave retained its licenses, for to do so would impermissibly tread on the FCC's regulatory authority and grant NextWave a right

beyond the terms and conditions of the license. Indeed, the Bankruptcy Court had no jurisdiction even to consider doing so, as Congress has vested exclusive jurisdiction to review FCC regulatory decisions in the D.C. Circuit and the other Courts of Appeal. *See* 47 U.S.C. § 402(a), (b); 28 U.S.C. § 2342(1). Thus, while NextWave held its licenses, its regulatory payment obligation was not subject to modification in bankruptcy, and was not a "debt that is dischargeable in the case under this title" within the meaning of Section 525.

Moreover, NextWave has conceded that cancellation of a license for a debtor's failure to fulfill obligations of an "executory contract"—defined as one " 'on which performance remains due to some extent on both sides,' "—would not violate Section 525. Br. in Opp. 17-18 (quoting H.R. Rep. No. 95-595, at 347). That is because Section 365 of the Bankruptcy Code requires a debtor either to reject such contracts or (in certain circumstances) accept their conditions. *See* 11 U.S.C. § 365; *id.* § 1107(a) (debtor-in-possession may exercise powers of trustee). NextWave has argued that cancellation of a license for failure to perform an executory condition would not violate Section 525 regardless of whether the debtor rejected or accepted the alleged contract.[7]

Even if NextWave's licenses can be considered contracts subject to the Bankruptcy Court's jurisdiction rather than nondischargeable regulatory conditions—and they should not be—the relationship between NextWave and the FCC is plainly executory, because NextWave owed payment and other duties, and the FCC owed NextWave various reciprocal duties, including the duty to prevent interference on

[7] According to NextWave, if a debtor rejected such a contract, cancellation would not violate Section 525 because "the FCC would have no obligation to perform its side of the contract," and if the debtor were allowed to reaffirm the contract, cancellation would likewise not violate Section 525 because the reaffirmed debt would not be "dischargeable." Br. in Opp. at 18 & n.8.

NextWave's frequencies. *See, e.g.*, 47 U.S.C. § 309(j)(1); 47 C.F.R. § 1.80. Indeed, in the analogous area of patent licenses, such licenses have been held to be executory because the licensor has the continuing obligation not to sue for infringement. *See, e.g., Everex Sys., Inc.* v. *Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 677 (9th Cir. 1996). Thus, under NextWave's *own* view of the law, the FCC's cancellation of NextWave's license would not violate Section 525.[8]

For these reasons, the FCC's determination to enforce its regulatory policy by recognizing the automatic cancellation of NextWave's licenses was not undertaken solely because of NextWave's failure to pay a debt that is dischargeable in bankruptcy. Obviously, NextWave owed the Government a substantial debt. And once NextWave surrenders its licenses and is no longer subject to the FCC's regulatory authority, the Bankruptcy Court could deal with that debt in the bankruptcy case with NextWave's other debts. The Second Circuit recognized as much. *See* Pet. App. 237a (if NextWave's licenses are returned to the FCC, "[a] bankruptcy court [could] resolve resulting financial claims that the FCC has

[8] If NextWave's licenses were considered contracts, NextWave would be required to reject them under Section 365. Section 365 prevents a debtor from assuming an executory contract if applicable law would prevent the debtor from assigning its obligations under the contract. 11 U.S.C. § 365(c)(1)(a) (preventing assumption when "applicable law excuses a party, other than the debtor, to such contract * * * from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession"). Because both the federal Anti-Assignment Act, 41 U.S.C. § 15, and the Communications Act, 47 U.S.C. § 310(d), prevent NextWave from assigning its licenses, NextWave could not assume an executory license agreement under Section 365. *See, e.g., United States* v. *TechDyn Sys. Corp. (In re TechDyn Sys. Corp.)*, 235 B.R. 857 (Bankr. E.D. Va. 1999) (contracts that cannot be assigned under Anti-Assignment Act cannot be assumed under Section 365).

against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt"). But the regulatory payment condition—the reason the licenses were cancelled—is not a dischargeable debt in bankruptcy while NextWave still holds the license. That condition is a regulatory requirement which, although connected to the underlying debt, is separate from it. And the only way that regulatory condition could conceivably be "discharged" is by modifying NextWave's license terms, which no bankruptcy court has the power to do.[9]

Accordingly, the cancellation of NextWave's licenses did not occur solely because NextWave failed to pay a dischargeable debt. And in any event, even if NextWave's underlying debt were somehow deemed dischargeable while NextWave held its licenses—which it should not be—the

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9 The D.C. Circuit recognized that, as the Second Circuit had held, "insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it." Pet. App. 42a. But the court nevertheless held that the license condition constituted a dischargeable debt under Section 525 even while NextWave retained the licenses because the Second Circuit "never decided that a court of competent jurisdiction (such as this one) could not modify or discharge it *under Section 525*." *Id.* (emphasis added). That holding misreads Section 525. For a cancellation to come within its scope, Section 525 requires that a debt be presently dischargeable under some *other* provision of the Bankruptcy Code "in the case under this title." 11 U.S.C. § 525(a). The D.C. Circuit's conclusion that invalidation under *Section 525* in a *different* case can satisfy the dischargeability requirement of that same section is tautological. A court of appeals has no jurisdiction to discharge a debt. *See* 28 U.S.C. § 1334(a) (district courts have "original and exclusive" jurisdiction over "all cases under title 11"); 11 U.S.C. § 1141(d)(1) (providing such courts with authority to discharge debts). Yet as even the D.C. Circuit seemed to recognize, the only court with such jurisdiction in this case—the Bankruptcy Court—had no power to relieve NextWave of its timely-payment condition so long as it held its licenses.

cancellation was not "solely because" of NextWave's failure to pay the debt itself, but rather because of the unchallenged regulatory policies served by the payment condition.

II. THE DECISION BELOW IS INCONSISTENT WITH THE STRUCTURE AND LEGISLATIVE HISTORY OF THE BANKRUPTCY CODE.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). A court must interpret a statute "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995), "fit[ting], if possible, all parts into an harmonious whole." *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959). Here, the D.C. Circuit's decision is inconsistent with the structure of the Bankruptcy Code, most notably Section 362(b)(4), which permits government entities to take regulatory action against a debtor notwithstanding the debtor's filing of bankruptcy.

Section 362(b)(4) is an exception to the Code's "automatic stay," 11 U.S.C. § 362(a), which otherwise prohibits various actions against debtors without bankruptcy court approval. Section 362(b)(4) exempts from the stay various efforts by governmental units—such as acts to obtain possession of or exercise control over estate property, *id.* § 362(a)(3)—where such acts are taken "to enforce such governmental unit's or organization's police or regulatory power." *Id.* § 362(b)(4). *See Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 39-40 (1991). As the Second Circuit held, any act the FCC may have taken to cancel NextWave's licenses was exempt from the automatic stay because the FCC was "[u]ndoubtedly

* * * a governmental unit that is seeking 'to enforce' its 'regulatory power.' " Pet. App. 125a.[10]

The automatic stay affords debtors a broad "breathing spell," S. Rep. No. 95-989, at 54-55 (1978), H.R. Rep. No. 95-595, at 340, by preventing various acts against debtors upon a bankruptcy filing, even if a bankruptcy court might later authorize the act. Given that Congress exempted the regulatory cancellation of NextWave's licenses from the broad scope of the automatic stay, it makes no sense to interpret Section 525 to flatly prohibit that same action. The D.C. Circuit's principal rationale for holding otherwise—that the language of Section 525 "clearly and explicitly prohibits

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[10] In *dicta*, the D.C. Circuit opined that Section 362(b)(4) might not apply to the cancellation because the FCC had taken protective security interests in NextWave's licenses and the regulatory power exception does not exempt actions to "enforce liens against property of the estate." 11 U.S.C. § 362(a)(4), (5). *See* Pet. App. 40a-41a. But the fact that the FCC took protective security interests in NextWave's licenses makes no difference. If the FCC had not taken such interests, cancellation of NextWave's licenses surely would not have been an action to "enforce" a lien. The result should be no different simply because the FCC, out of an abundance of caution, took such interests to protect its "resulting financial claims," Pet. App. 237a, which would be resolved *after* NextWave's licenses were returned. Indeed, NextWave's own security agreement with the FCC provided that the security interest was "not in derogation of any of the Commission's regulatory authority over the License." Pet. App. 403a-404a.

In any event, the cancellation did not implicate the automatic stay provisions involving liens because the cancellation was automatic and thus did not involve any affirmative "act" against the debtor. 11 U.S.C. § 362(a)(4), (5). *See FAA* v. *Gull Air, Inc. (In re Gull Air, Inc.)*, 890 F.2d 1255 (1st Cir. 1989) (automatic withdrawal of airline landing slots did not violate automatic stay); *United States* v. *Kansas Personal Communications Servs., Ltd.*, 256 B.R. 807 (D. Kan. 2000) (automatic cancellation of debtor's spectrum licenses did not violate automatic stay).

governmental units, for *whatever* reason, from canceling licenses for failure to pay a dischargeable debt," Pet. App. 39a (emphasis in original)—is mistaken. As shown above, the statute only prohibits cancellation when the failure to pay a dischargeable debt is the *sole* reason. Thus, interpreting Section 525 to allow cancellations based at least in part on regulatory reasons does not "amount[] to a request for a regulatory purpose exception to section 525," as the D.C. Circuit concluded. *Id.* at 43a. Rather, such an interpretation follows the plain language of the statute, is fully consistent with Section 362(b)(4), and promotes harmony within the entire statutory scheme. NextWave's interpretation, by contrast, promotes discord by presuming that Congress intended to exempt from the automatic stay license cancellations for regulatory reasons while at the same time completely prohibiting those same cancellations under Section 525.

The legislative history of Section 525 confirms this reading of the statute. As the both the House and Senate Reports note, Section 525 "does not prohibit consideration of other factors" not listed in the statute, "such as future financial responsibility or ability." H.R. Rep. No. 95-595, at 367; S. Rep. No. 95-989, at 81. As the House Report notes:

> [t]he prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy * * * or the examination of prospective financial condition or managerial ability. * * * *[I]n those cases where the causes of a bankruptcy are intimately connected with the license,* * * *an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate actions without running afoul of bankruptcy policy.* [H.R. Rep. No. 95-595, at 165 (emphasis added).]

This history thus makes clear that Congress did not intend to prevent a government agency from canceling a license based on reasons not among those enumerated in the statute—and specifically "where the causes of the bankruptcy

are intimately connected with the license." *Id.* That must include not only lack of "future financial responsibility or ability," *id.* at 367; S. Rep. No. 95-989, at 81, but also, as here, the fact that a debtor may not be "the applicant most likely to use the [l]icense[] efficiently for the benefit of the public." Pet. App. 45a (quotation omitted). Because Congress wanted to leave government agencies free "to pursue appropriate regulatory policies and take appropriate actions," H.R. Rep. No. 95-595, at 165, its use of the term "solely" makes perfect sense.

The D.C. Circuit found the statute's legislative history unpersuasive because it "do[es] not state that an agency may use timely payment of a dischargeable debt as the sole indicator of [financial] responsibility." Pet. App. 46a. But it is precisely when the "causes of the bankruptcy are intimately connected with the license"—*e.g.*, when a licensee's past default shows that it is presently unfit to hold the license—that Congress intended to permit government agencies to pursue appropriate regulatory policies by canceling the license. By permitting consideration of the circumstances of the bankruptcy in determining regulatory fitness, Congress could not have meant to preclude *any* reliance on the one factor—the failure to pay past debts—that causes most bankruptcies. So long as a cancellation is not "solely because" of the failure to pay debts but rather serves other valid regulatory purposes, it does not run afoul of Section 525.

This reading is further confirmed by the legislative history making clear that Section 525 was specifically intended to "codif[y]" the "*Perez* situation." H.R. Rep. No. 95-595, at 165, 366-367; S. Rep. No. 95-989, at 81. *Perez* v. *Campbell*, 402 U.S. 637 (1971), involved an Arizona statute that prevented drivers whose licenses had been suspended due to unpaid traffic accident judgments from gaining reinstatement of their licenses where the judgments had been discharged in bankruptcy. *See id.* at 642 (challenged statute provided that "[a] discharge in bankruptcy following the rendering of any

such judgment shall not relieve the judgment debtor from any of the requirements of this article") (citation omitted). Rejecting the argument that the law furthered regulatory purposes apart from the collection of debts, the Court held that "[t]he sole emphasis in the Act is one of providing leverage for the collection of damages." *Id.* at 646. As the Court noted, the statute had the "declared purpose to protect judgment creditors 'from financial hardship' by giving them a powerful weapon with which to force bankrupts to pay their debts despite their discharge." *Id.* at 654. The Court held that this law conflicted with the Bankruptcy Code's policy of allowing debtors a "fresh start."[11]

This case is nothing like the "*Perez* situation" that Congress intended to codify in Section 525. The FCC is not using the failure to pay a debt unrelated to the license grant as a "powerful weapon" to coerce NextWave into paying that debt. *Id.* Far from it. Unlike the *Perez* situation, the FCC enforced NextWave's license conditions not as leverage to collect a debt but rather to serve its regulatory goal of allocating spectrum licenses to those most likely to serve the public interest in furthering efficient, effective, and timely service and the rapid development of new technologies. Indeed, once NextWave failed to comply with its license conditions, the FCC was not particularly interested in collecting the money owed by NextWave. Instead, it rejected NextWave's offer of a lump-sum payment and insisted on enforcing the automatic cancellation requirement in order to further its critical regulatory objectives. *Perez* makes clear that Section

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[11] The Court held that the statute did not serve the purpose of deterring negligent motorists because, among other reasons, negligent motorists against whom no judgment was entered could gain reinstatement of their licenses through voluntary agreements with their victims or other means. *Id.* at 647-648 & n.12.

525 was never intended to permit a licensee to frustrate important regulatory purposes of this sort.[12]

The official title of Section 525—"Protection against discriminatory treatment"—further confirms this understanding. *See, e.g., Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (title of statute and heading of section are proper aids for determining meaning of statute). The statute was plainly intended to prevent *discrimination* against debtors. As in *Perez*, revoking or denying a license for failure to pay a dischargeable debt unrelated to the license itself discriminates against debtors because it penalizes them for exercising their right to discharge debts in bankruptcy. But a uniform policy of revoking or denying licenses whenever a licensee has failed to satisfy regulatory requirements—including requirements connected with payments owed for the licenses themselves—in no way discriminates against debtors.[13] NextWave, by contrast, seeks to "pervert § 525(a) by turning

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[12] *See Smith* v. *St. Louis Hous. Auth. (In re Smith)*, 259 B.R. 901, 906 (BAP 8th Cir. 2001) ("Section 525 does not operate to cure [debtor's] contractual defaults and does not require the [agency] to continue its contractual relationship with her."); *In re Bacon*, 212 B.R. 66, 75-76 (Bankr. E.D. Pa. 1997) (under Section 525 governmental unit "is free to exercise its contractual rights so long as it does not seek to collect the dischargeable debt"); *Spruce Ltd. P'ship* v. *Lutz (In re Lutz)*, 82 B.R. 699, 704 (Bankr. M.D. Pa. 1988) ("Section 525 does not * * * prevent a governmental unit from taking actions which are not discriminatory and which are not based on an intent to collect a discharged debt.").

[13] *See In re Lutz*, 82 B.R. at 705 (Section 525 "is aimed at discriminatory treatment by governmental units. It does not cure contractual defaults and does not require governmental units to continue a contractual relationship with a debtor when, pursuant to the terms of that contract, the prepetition default constitutes cause for terminating the contractual relationship."); *accord Robinson* v. *Chicago Hous. Auth., (In re Robinson)*, 169 B.R. 171, 176-177 (N.D. Ill. 1994), *aff'd*, 54 F.3d 316 (7th Cir. 1995).

it into a sword rather than a shield." *In re James*, 198 B.R. at 889. It seeks to force the FCC to discriminate in its *favor* by granting it something a non-debtor cannot have: a license to use the Nation's valuable airwaves without timely paying what it bid, notwithstanding the FCC's determination that such a license disserves the public interest.

III. THE DECISION BELOW IS INCONSISTENT WITH THE COMMUNICATIONS ACT AND DISSERVES THE PUBLIC INTEREST.

The D.C. Circuit's contrary reading of Section 525 not only upsets the balance of the Bankruptcy Code itself, but also needlessly sets the Bankruptcy Code at war with the Communications Act. *See Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective."). The D.C. Circuit's holding that the Bankruptcy Code forces the FCC to leave licenses in the hands of an entity the agency has determined is not serving the public interest simply cannot be reconciled with Congress' clear intent that the *FCC*—not individual licensees or bankruptcy courts—be the exclusive arbiter of whether the issuance and retention of spectrum licenses serves the public interest.

As noted, "Congress assigned to the Federal Communications Commission . . . *exclusive* authority to grant licenses" to use the radio spectrum. *Metro Broad.*, 497 U.S. at 553. Thus, as this Court has held, "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942). In order for license to be awarded, "it is the Commission, *and not the courts*, which must be satisfied that the public interest will be served." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946) (emphasis added). *See also Red Lion*, 395 U.S. at 375 n.4. Under the D.C. Circuit's decision, however, the determination of who is entitled to a license is no longer made by the agency charged by Congress with the exclusive authority

to allocate licenses, but by individual licensees aided by bankruptcy judges applying bankruptcy law.

When it authorized competitive bidding as a means of license allocation, Congress continued the role of the FCC as the exclusive arbiter of the public interest. *See* 47 U.S.C. § 309(a) ("the Commission shall determine, in the case of each application filed with it [for a license], whether the public interest, convenience, and necessity will be served by the granting of such application"). The manner in which the FCC determines fitness to hold a license, however, did change. Rather than determining fitness in advance through individualized comparative hearings, Congress—and the FCC in implementing Congress' will—placed their faith in market forces, establishing a strong national policy of using auctions to allocate licenses. *See* 47 U.S.C. § 309(j)(1). This expressed Congress' view that competitive bidding "*will ensure that spectrum is used more productively and efficiently than if handed out for free.*" H.R. Rep. No. 103-111, at 249 (emphasis added).

This method for determining the public interest, however, only works if the spectrum is not "handed out for free." Under the auction regime, the ability and willingness of a licensee to pay for use of the public spectrum becomes the central means for determining whether that licensee is serving the public interest. As the Second Circuit explained, the auction mechanism can achieve "fair and efficient allocation of spectrum licenses * * * only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue." Pet App. 246a. "If the transaction can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining valuation is impaired." *Id.* Indeed, the FCC recognized as much when it declined to allow financially troubled C block bidders to retain their licenses for less than they had bid. *See* 12 F.C.C.R. 16436 ¶ 19.

The D.C. Circuit's interpretation thus severely undermines the integrity of the auction system. It allows individual licensees and bankruptcy courts to override the FCC's exclusive role as the arbiter of the public interest, thereby impermissibly "grant[ing] an applicant an authorization which the Commission has refused." *Scripps-Howard Radio*, 316 at 14. And it does so by preventing the FCC from relying on what is now perhaps the most critical factor in determining that public interest: the ability of a licensee to pay. The ultimate loser, of course, is the public. Here, for example, after receiving its licenses NextWave declared bankruptcy and "provid[ed] no service." Pet. App. 82a. This action has indisputably impeded Congress's goals of promoting "the development and rapid deployment of new technologies, products, and services," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). As the FCC found, "NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services * * * to the detriment of the American public." Pet. App. 82a.

Meanwhile, the agency has been prevented from awarding the licenses to other entities that stand ready to use those licenses responsibly to further congressionally-mandated objectives. The magnitude of the harm to the public is staggering. Spectrum worth more than *$15 billion* has lain fallow for more than five years, at a time when there is a critical shortage of spectrum resources. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, FCC 02-33, App. B ¶ 35 (Feb. 6, 2002). There is, of course, no way to manufacture new spectrum frequencies, and ANW and VoiceStream are vitally interested in obtaining their licenses in large part because the frequencies now being hoarded by NextWave are among the last usable frequencies available to the burgeoning PCS

wireless industry. *See* Bennett Z. Kobb, *Wireless SPECTRUM Finder* 213-224 (2001). NextWave is entitled to a "fresh start" by declaring bankruptcy, but it is not entitled to hold the public interest and the FCC's regulatory programs hostage in the process.

The D.C. Circuit's answer to this blatant conflict with the policies of the Communications Act—that the FCC was not required to utilize installment payments, Pet. App. 50a—is no answer at all. Congress expressly directed the FCC to consider the use of installment payments, 47 U.S.C. § 309(j)(4)(A), in part to further the Act's other goal of "disseminating licenses among a wide variety of applicants, including small businesses." *Id.* § 309(j)(3)(B). The FCC determined that allowing installment plans would further the public interest, yet the D.C. Circuit's interpretation effectively sounds the death knell for this regulatory tool, thereby narrowing the variety of future applicants.[14]

And in any event, the D.C. Circuit's interpretation is not limited to licenses held under installment plans (hundreds of which are still in effect). The FCC continues to award licenses by auction. Because the FCC is statutorily obligated to ensure that a winning bidder is qualified to hold a license before granting it to the bidder, *see* 47 U.S.C. § 309(j)(5), there is often a significant delay between the close of an auction and the time that the bidder's payment becomes due

[14] Indeed, the FCC decided to suspend its installment payment program precisely because of the delay and uncertainty caused by the bankruptcy process. *See In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 F.C.C.R. 15743 ¶ 50 (1998). As the FCC noted, Congress's objective "to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court." *Id.*

and the license is awarded.[15] Yet under the D.C. Circuit's interpretation, Section 525 would prohibit the FCC from "deny[ing]," 11 U.S.C. § 525(a), a license to any high bidder that declared bankruptcy after the auction but before the license grant and refused to make good on its bid. Now that the FCC has discontinued future installment plans, this scenario is all the more likely, since bidders must now make payments up front and in full.

This rule would not only frustrate the FCC's goal of allocating spectrum to those who will use it efficiently for the benefit of the public, but would also undermine the credibility of the auction process. *See* 12 F.C.C.R. 16436 ¶ 19 (FCC determination that allowing bidders to retain licenses for less than they bid "would be very unfair to other bidders," and would "gravely undermine the credibility and integrity" of the auction system). It allows bidders to "game" the system by outbidding others who value the spectrum at realistic financial levels and would in fact fulfill their bids, and then—as NextWave and other bidders have successfully managed to do—seek to have their payment obligations adjusted or eliminated in bankruptcy.[16] In this way, bidders

[15] For example, in the re-auction ANW was designated as the winning bidder for certain licenses not previously held by NextWave, but was not finally awarded those licenses for thirteen more months, due to a legal challenge the FCC eventually found groundless. *See Applications of Alaska Native Wireless, L.L.C. File Nos. 0000364320 and 0000363827, Auction No. 35 - C & F Block PCS*, No. DA-504 (WTB Mar. 4, 2002); Public Notice, *Wireless Telecommunications Bureau Grants 15 C and F Block Broadband Personal Communications Services (PCS) Licenses to Alaska Native Wireless, L.L.C.*, No. DA 02-589 (WTB Mar. 11, 2002).

[16] For example, in *United States* v. *GWI PCS 1, Inc.*, 245 B.R. 59, 61 (N.D. Tex. 1999), *aff'd*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001), GWI PCS 1, Inc.—the second largest C-block license holder—successfully persuaded the bankruptcy

could obtain valuable rights to the public airwaves at a discount, which they could then seek to use or transfer for huge profits. Petitioners hope to be repeat players in the auction process, but they will have to reevaluate their future participation if financially irresponsible applicants are allowed to distort bid price levels and then use bankruptcy to avoid paying what they unrealistically bid. If allowed, this type of auction environment would discourage reasonable, prudent bidders from participating and, ultimately, produce less revenue for the Treasury.

The FCC, moreover, is by no means the only government agency whose regulatory authority is threatened by the D.C. Circuit's interpretation of the Bankruptcy Code. Hundreds of other federal, state, and local government agencies award licenses, franchises, or "similar grant[s]," 11 U.S.C. § 525(a), conditioned in part on payment obligations designed to ensure that the public interest is served. In particular, a number of other federal agencies operate programs that allocate scarce resources through competitive bidding. Examples include the Bureau of Land Management, which awards coal, oil and gas, and other mineral leases, *see, e.g.*, 30 U.S.C. §§ 201, 226; 43 C.F.R. § 3508.11; the Bureau of Indian Affairs, which awards mineral leases on tribal lands, *see, e.g.*, 25 C.F.R. §§ 211.20; 212.20; and the Forest Service, which awards timber sales contracts. *See, e.g.*, 36 C.F.R. § 223.100. Such leases and contracts are subject to cancellation for violations of applicable law or their terms. *See, e.g.*, 30 U.S.C. § 188; 25 C.F.R. §§ 211.54, 212.54; 36 C.F.R. § 223.116. State and local governments likewise issue billions of dollars worth of franchises and similar grants conditioned on the timely payment of fees.

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court to reduce its license payment obligations by 80 percent on fraudulent conveyance grounds. Moreover, as the FCC has noted, "[d]ozens of licensees that acquired spectrum through the auction process have filed for bankruptcy protection," tying up spectrum worth billions of dollars. FCC Cert. Reply Br. 2-3 & n1.

If the D.C. Circuit's decision is upheld, however, an agency will not be able to cancel such a lease or contract where a debtor defaults on a payment obligation, even if the agency—like the FCC here—reasonably determines in an exercise of its regulatory authority that cancellation is necessary to ensure that precious resources are put to their best use. Congress never intended for Section 525's narrow proscription against discriminatory treatment to extend this far. Contrary to Congress' intent, the D.C. Circuit's decision prevents government agencies from "pursu[ing] appropriate regulatory policies and tak[ing] appropriate action" where the causes of a bankruptcy are "intimately connected" with license obligations. H.R. No. 95-595, at 165. This Court should reverse the decision below to ensure that the FCC and other regulatory agencies retain the power to carry out the important regulatory responsibilities entrusted to them.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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